

C5HZTAGM

Motion

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 THE AUTHORS GUILD, et al.,

4 Plaintiffs,

5 v.

11 CV 6351 (HB)

6 HATHITRUST, et al.,

7 Defendants.

8 -----x

9 May 17, 20012
10 1:10 p.m.

11 Before:

12 HON. HAROLD BAER, JR.,

13 District Judge

14 APPEARANCES

15 FRANKFURT KURNIT KLEIN & SELZ PC

Attorneys for Plaintiffs

16 BY: EDWARD H. ROSENTHAL

JEREMY GOLDMAN

17 KILPATRICK TOWNSEND & STOCKTON LLP

18 Attorneys for Defendant Hathitrust, et al.

19 BY: JOSEPH PETERSEN

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20 ALLISON SCOTT ROACH

21 BROWN GOLDSTEIN & LEVY

Attorneys for Defendant NFB

22 BY: DANIEL F. GOLDSTEIN

23 THE LAW OFFICE OF ROBERT J. BERNSTEIN

Attorneys for Defendant NFB

24 BY ROBERT J. BERNSTEIN

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1 THE DEPUTY CLERK: The Authors Guild versus
2 Hathitrust. Counsel for the plaintiffs, state your name for
3 the record.

4 MR. ROSENTHAL: Edward Rosenthal from Frankfurt Kurnit
5 Klein & Selz, and with me is Jeremy Goldman from my office.

6 MR. PETERSEN: Good afternoon, your Honor, Joe
7 Petersen from Kilpatrick Townsend, my partner Joe Beck is here,
8 and my colleague Andrew Pequignot and Allison Roach.

9 MR. BERNSTEIN: Good morning, your Honor -- good
10 afternoon, your Honor, Daniel Goldstein on behalf of the
11 defendants National Federation for the Blind and the individual
12 defendants. With me is my associate Laurie Ableson, and Robert
13 Bernstein of the law offices of Robert Bernstein.

14 THE DEPUTY CLERK: Please be seated.

15 THE COURT: I have 45 minutes, gentlemen. I hope you
16 divide up -- and lady -- I trust you divided up your time so
17 that you all get to put in your two cents, since I have nine
18 conferences that follow, 15 minutes apart, beginning at 2:00,
19 and that's without lunch.

20 So, as I understand it, there are a series of semi
21 housekeeping problems, as well as the two motions, one by the
22 defendant for partial judgment on the pleadings. I guess,
23 essentially, both motions are for that relief. The plaintiff's
24 motion, as well, claims that the defendants are not shielded,
25 and I should hold, by the First Amendment or fair use defense

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1 or any other provision of the Copyright Act. Those are the two
2 motions.

3 There's also some discovery concerns. I have, as you
4 obviously know, the problem with the sick Mr. Salamanca does
5 seem to pretty well be explained by the fact that he's even
6 older than I am. But then he also has multiple medical
7 problems, and then he lists those variety of problems. I'm
8 really at least of a mind, until anybody argues -- and I
9 assume, and I assume you've all gotten Dr. Nay's letter -- I
10 assume everybody is of the same mind here as to have to do
11 without him, but I'll listen to anybody who may differ.

12 MR. ROSENTHAL: Your Honor, just to -- as we said in
13 the letter we wrote to the Court, Mr. Salamanca's literary
14 agent who would have knowledge, to the extent there's any
15 relevant knowledge relevant to the issues in this case, would
16 have knowledge, is willing to testify in the place of
17 Mr. Salamanca. We've offered that for an extended period of
18 time.

19 MR. PETERSEN: And, your Honor, I offered to take a
20 train down or drive down to Maryland and depose Mr. Salamanca
21 for a very limited amount of time. I don't believe the
22 doctor's note actually definitively rules out a deposition. It
23 talks to physical condition preventing Mr. Salamanca from
24 appearing in New York. I was willing to take that deposition
25 in Maryland.

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1 THE COURT: I thought that, I thought he understood
2 that you were all ready to this at his bedside.

3 MR. PETERSEN: I don't believe --

4 THE COURT: The doctor.

5 MR. PETERSEN: I don't believe the doctor's note --
6 the doctor's note was --

7 THE COURT: No, the doctor's note doesn't say that. I
8 thought that on my endorsement or at least your offer had
9 indicated that.

10 MR. PETERSEN: That's correct, your Honor.

11 THE COURT: So that he knew that or should have known
12 that.

13 MR. PETERSEN: The doctor did not know that, because
14 that doctor's note was tendered prior to your Honor's order.

15 THE COURT: Oh, my goodness. Then it really shouldn't
16 count at all.

17 How come you didn't give to it me then before I saw
18 the letter saying how he doesn't want to come by? If you had
19 the letter, wouldn't that have been helpful? Did I see it
20 before? Well, it's of no moment. You don't think this letter
21 does it, I gather.

22 MR. PETERSEN: I don't believe the letter does it,
23 although, your Honor, we'd be willing to accede on the
24 deposition of Mr. Salamanca if plaintiff will produce the other
25 named witnesses in New York. So we're just looking to take

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1 some depositions in New York, your Honor. We believe we're
2 entitled to do that, and we've had a heck of a hard time
3 scheduling those depositions. So if we can get Mr. Stiles in
4 New York, if we can get Mr. Loukakis -- and I understand from
5 Mr. Rosenthal's letter earlier today to me that Mr. Loukakis
6 will come in from Australia -- if we can get Mr. Ronning, we'd
7 be happy to take Mr. Salamanca's agent's deposition in New York
8 as well.

9 THE COURT: Very well.

10 Well, the other -- I gather you've set the other
11 depositions for later this month, right?

12 MR. PETERSEN: At this point, your Honor, we've only
13 scheduled one deposition for this month, that's Ms. Cummings'
14 deposition. That will take place on Tuesday, next week. I
15 understand that Mr. Loukakis is available in New York between
16 May 31 and June 8th. We're happy to take his deposition during
17 that time period, as long as your Honor has no objection to our
18 taking that deposition outside the fact discovery period.

19 THE COURT: Yes. Well, I don't have much choice,
20 assuming we're going to get -- the depositions are going to
21 have to come outside the discovery period, right? So --

22 MR. PETERSEN: Right.

23 THE COURT: -- thanks for nothing. So, and what about
24 Ronning?

25 MR. PETERSEN: Ronning, your Honor, plaintiffs are

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1 only -- are sticking by their position that he's too busy, and
2 he can appear by video. We should suffice with a video
3 deposition. We believe --

4 THE COURT: I really -- video deposition is perfectly
5 all right with me. So that takes care of Ronning, Loukakis and
6 Cummings, those are the three that had problems and those
7 problems have now been resolved. And we're doing, at the
8 moment at least, doing with Mr. Salamanca's agent. We'll see
9 how -- I'll look at this letter more carefully, although I'm
10 not sure it will mean much more to me.

11 MR. PETERSEN: Your Honor, there's one other witness
12 we haven't spoken about, and that's T.J. Stiles. He's based in
13 San Francisco. Counsel, earlier today, has offered to pay for
14 counsel for the Libraries to take that, to travel to San
15 Francisco to take that deposition in San Francisco. I
16 understand Mr. Stiles cannot appear in New York. We would be
17 willing to do that under that stipulation, your Honor.

18 THE COURT: All right, that sounds okay to me.

19 So I assume that's all resolved and the depositions
20 are all going forward in one fashion or another.

21 Is there anything else we need to resolve before we
22 listen to what it is you've written briefs about, which seem to
23 be sort of overwhelming, but --

24 MR. BERNSTEIN: Your Honor, Robert Bernstein for the
25 NFB. Simply requested in the letter yesterday --

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1 THE COURT: I haven't read your letter of yesterday.
2 I got here about ten minutes before I started to talk to these
3 three defendants.

4 MR. BERNSTEIN: The request is, we've subpoenaed
5 Copyright Clearing Center in Boston, which is where they're
6 located, issued out of the District of Massachusetts under the
7 rules. They intend or actually I think did file a motion for
8 protective order this morning up in Boston, and we simply want
9 your Honor to permit us to take the deposition beyond May 20,
10 if we successfully oppose that motion.

11 THE COURT: I think we'll just have to review the
12 pretrial scheduling order and provide a little more time. But
13 it'll certainly provide before, or at least until the end of
14 the month for discovery.

15 And that really goes for all of you. I mean, I don't
16 want any of these other depositions we've just discussed to
17 take any longer than that either. So be conscious of the fact
18 that we'll extend the discovery period, but probably not for
19 more than that length of time.

20 MR. PETERSEN: Your Honor, I had one further
21 scheduling issue if your Honor will entertain.

22 THE COURT: Sure.

23 MR. PETERSEN: We're getting to the point now of
24 briefing summary judgment motions, which I believe under the
25 Court's order would be due the latest in late June.

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1 I've had a discussion with counsel for plaintiffs in
2 which we would agree to a simultaneous filing summary judgment
3 motions at some point, a little bit earlier than that in mid
4 June.

5 But the motions that are before your Honor now,
6 particularly our Rule 12 motion, which would dramatically
7 change the scope of the case, simplify the issues that we
8 believe we would need to brief on summary judgment. So we did
9 raise as a scheduling issue. It would obviously be helpful to
10 have your Honor's ruling in advance of moving for summary
11 judgment.

12 THE COURT: Well, I know how important these motions
13 are to you, at least by volume. But my view is if there's
14 going to be a summary judgment motion and you're going to make
15 it even earlier than it was, that I'm going to wait for that
16 and not even rule on these. I'm sure you'll tell me how it
17 wouldn't be any case at all if I ruled on these, because in
18 fact you understand -- as you understand the law, there won't
19 be anything left. But I am not going to rule or spend the time
20 to rule on the Rule 12 motions if I'm going to get a summary
21 judgment motion within two weeks thereafter. That would really
22 be absurd.

23 MR. PETERSEN: Your Honor --

24 THE COURT: I mean, in terms of Court's convenience.
25 I don't suppose it bothers any of you.

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1 MR. PETERSEN: Your Honor, summary judgment motions
2 will be on a different issue than really before the Court on
3 the Rule 12.

4 THE COURT: You better put it all in, or we'll just
5 combine them. It doesn't make any difference.

6 What I'm trying to get across, apparently not very
7 well, is you're going to do this once. So if you want to do
8 them all and keep all the pieces of paper I have already,
9 that's fine. But when we resolve it, we're going to resolve it
10 all at one time. Because otherwise we'll just be keeping on
11 trying to keep on the treadmill while you keep on writing,
12 which, for which I'm sure you're being paid by the hour, but I
13 don't have that opportunity. Is that fairly clear to all of
14 you? Okay.

15 But I'm glad to hear you and see whether or not, A,
16 anything changes my mind, and, B, whether I learn something,
17 which I certainly hope will be the case.

18 I have no preference as to which we hear first. The
19 defendant's motion on the pleadings with respect to subject
20 matter jurisdiction is probably an easier one for me to
21 resolve, so why don't we hear that first.

22 MR. PEQUIGNOT: Hi, your Honor, my name is Andrew
23 Pequignot. I'm here on behalf of the Libraries, arguing the
24 portion of our motion for judgment on pleadings with respect to
25 associational standing. My colleague, Allison Roach, will

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1 actually be arguing the issues with respect to the Orphan Works
2 Project.

3 Before I get started, your Honor, I just wanted to --
4 first time I'm appearing in front of you -- I just wanted to
5 briefly thank you for admitting me pro hac to appear in this
6 case.

7 THE COURT: My pleasure. You pay a lot of money to
8 the bench and bar fund.

9 MR. PEQUIGNOT: Your Honor, at bottom, the Libraries'
10 arguing that each of the plaintiffs in this case should have to
11 satisfy prime facie elements of a copyright infringement claim.
12 The associations concede that they are unwilling and unable to
13 satisfy this burden with respect to each of the works they're
14 claiming to be part of this case. The associations claim
15 instead that associational standing allows them to circumvent
16 these requirements to assert the rights of tens of thousands of
17 unidentified member authors.

18 The associational plaintiffs' position must fail,
19 however, because the Court lacks federal jurisdiction to
20 resolve their claims. Federal jurisdiction depends both on
21 constitutional and statutory authority.

22 First, the associations ignore altogether the
23 threshold and dispositive questions of statutory authority.
24 The Court lacks statutory authority to resolve the
25 associations' claims because the plain text of subsection 521,

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1 as the Second Circuit has interpreted on multiple occasions,
2 limits the class of plaintiffs that can, quote, institute an
3 action to legal and beneficial copyright holders.

4 The associations in this case are not legal or
5 beneficial copyright holders of any of the works identified in
6 the first amended complaint. For this reason alone, your
7 Honor, we submit that the plaintiffs' motion should be granted.
8 Even if the Court disagrees with us on this issue, the Court
9 still lacks federal jurisdiction. The constitutional
10 prudential limitations of associational standing are summarized
11 in the three part test set forth in Hunt. The Hunt --

12 THE COURT: I'm not sure. That's essentially brought,
13 in part, at least under the copyright law, right?

14 MR. PEQUIGNOT: Your Honor --

15 THE COURT: This lawsuit?

16 MR. PEQUIGNOT: Yes, the suit is brought under the
17 Copyright Act.

18 THE COURT: And you don't argue, but that that
19 provides subject matter jurisdiction for the lawsuit, at least
20 the copyright law does provide that opportunity.

21 MR. PEQUIGNOT: The Copyright Act supplies federal
22 jurisdiction, if the requirements of Section 501 are satisfied.

23 THE COURT: You have a problem with whether they're
24 satisfied.

25 MR. PEQUIGNOT: Yes. The individual plaintiffs in

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1 this case -- we don't have any argument with respect to the
2 individual plaintiffs. It's simply the associations in this
3 case.

4 THE COURT: I just wanted to make sure at least I was
5 on the same page. Go ahead.

6 MR. PEQUIGNOT: So, your Honor, we contend the
7 associations lack federal jurisdiction because there's no
8 statutory authority.

9 We also argue there is no constitutional authority.
10 The constitutional and prudential limitations of associational
11 standing are summarized in the three part test set forth in the
12 Supreme Court's decision in Hunt. The Hunt test requires that
13 at least one member of the associations have standing in their
14 own right; that the issues in the case are germane to the
15 associations' purpose, and that the participation of the
16 individual members will not be required to adjudicate the
17 claims and defenses.

18 The parties have argued with respect to the first and
19 the third factor of this test.

20 Under the first test, which addresses the article
21 three requirement of injury in fact, the associations would
22 have to establish standing on behalf of their members, prime
23 facie case of copyright infringement.

24 Your Honor, under the Hunt test, while the test on its
25 face only requires them to establish standing on behalf of one

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1 of their members, this does not have the import that the
2 associations argue in their briefs. The associations cannot
3 blindly assert standing on behalf of tens of thousands of
4 unidentified member authors.

5 THE COURT: But they don't have to, right?

6 MR. PEQUIGNOT: Well, they can not and -- no. We
7 argue that they, that they -- that under the Hunt test, while
8 asserting the rights of one member may get them in the door,
9 their standing is coextensive with the standing of their
10 members. In other words, article three prevents them from
11 going beyond the standing of their members.

12 THE COURT: Let's assume that you're right and there
13 was only one. I assume -- well, let's assume that there was a
14 member who had standing and we proceeded that way. How would
15 that help you if, indeed, you lost, when we had explored the --
16 or the jury -- I think you asked for a jury, although I
17 wouldn't like to be part of it, but be that as it may -- when
18 we get a verdict and you lose, what would that do to you or to
19 the associations' position? Everybody would simply follow
20 getting some sort of standing in order to proceed.

21 MR. PEQUIGNOT: I'm not sure I fully understand the
22 question. If the associations are dismissed from this case,
23 the individual plaintiffs will go forward, and the same issue
24 issues will be resolved.

25 THE COURT: Right. And that's agreeable with you?

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1 MR. PEQUIGNOT: Yes, that the individual plaintiffs go
2 forward on these claims, yes, with respect to the works that
3 are identified in the first amended complaint, and for which a
4 prime facie case of copyright infringement has been alleged.

5 Your Honor, really this is the -- this is the crux of
6 the issue. Because the associations -- the associations cannot
7 allege or cannot prove standing with respect to each of their
8 individual members. The associations, without their members'
9 participation, the associations cannot establish for the
10 copyrights and the millions of works that have been digitized
11 by the libraries, whether copyrights are held by a member
12 author. They can't say whether it's owned by the member
13 author's grandchildren, or an ex-spouse or creditor or
14 assignee, an employer for hire. They can't say whether there
15 is a registration, whether the registration has been renewed or
16 renewed at the right time by the right party.

17 Your Honor, we contend that we need all these
18 individualized facts with respect to each work that's going to
19 be part of this case. And, your Honor, it's this
20 individualized proof that also dooms the associations' ability
21 to satisfy the third factor in the Hunt test, because
22 individualized proof will be necessary.

23 Judge Cote's opinion of National Association of
24 Freelance Photographers, and the recent decision in the AIME
25 case in The Central district of California, both deny

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1 associational standing on this basis.

2 And, your Honor, individualized proof may also be
3 necessary for the libraries to -- for the libraries to
4 establish their activities are protected for uses. As your
5 Honor knows, under the flexible fair use test, the Court will
6 need to consider, among other things, whether the works are in
7 print or out of print, whether they're creative or factual in
8 nature, and whether there is an actual or potential market for
9 the works.

10 Your Honor, the associations in this case make it
11 sound like every work digitized by the libraries is a New York
12 Times best seller for 2011, but they fail to mention the 1958
13 book on disease control in corn production or the 1939 book on
14 tuberculosis treatments.

15 Your Honor, to the extent that the associations can
16 establish any viable market for any of the libraries' uses,
17 either actual or potential, which is certainly something that
18 the libraries will contest vigorously, the likelihood of any
19 market harm for these types of works in particular is slim to
20 none. Your Honor, this is the type of individualized proof
21 that we will need to look at, and the libraries will be
22 prejudiced if they can not look at this evidence and make these
23 arguments.

24 Your Honor, for all these reasons, we submit that the
25 association should be denied associational standing.

1 THE COURT: All right, why don't we discuss that
2 aspect first before we hear your colleague, if you don't
3 have -- unless you agree.

4 MR. ROSENTHAL: No, we certainly don't agree. Your
5 Honor, if the Court's --

6 THE COURT: Let's talk about where he spent most of
7 his time, which is the individual proof problem.

8 MR. ROSENTHAL: I think, your Honor, that actually
9 goes, in many ways, to the crux of this case.

10 This is a case where the defendants have copied
11 millions of books. They've copied ten million books in
12 conjunction with Google, seven million of which are protected
13 by copyright. And this partly goes to the motion we made this
14 in this case.

15 So, your Honor, they engage in this preemptive mass
16 digitization. And they justify that somehow that is justified
17 as a fair use or otherwise, and somehow we have to look at each
18 individual work to determine whether the books he mentioned
19 about farming or the best sellers are, themselves, there's some
20 fair use defense for that.

21 But what the defendants did here, they copied all
22 these books first. They digitized all these books. They saved
23 themselves hundreds of millions of dollars without giving any
24 consideration to any fair use issue with respect to any
25 individual book. And now they're asking -- they're asking the

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1 Court and the plaintiffs to come back and say, this particular
2 work, there is a market for this particular work, there's harm
3 for this particular work. They can't have their cake and eat
4 it too. They can't digitize millions of books and then come
5 back and say that we have to show how a particular harm --
6 there was a particular harm to a particular book, and that goes
7 to the standing.

8 THE COURT: What do you think the law indeed says
9 about that?

10 MR. ROSENTHAL: Your Honor, this is a very -- this is
11 a very unusual case. We have a federal statute, Section 108 of
12 the Copyright Act. It was specifically written to deal with
13 when libraries and archives can make copies of works. And
14 they're very specific. It's for preservation purposes. It's
15 to replace stolen books. It's for upon individual library
16 request. And now what has happened here is that the defendants
17 have just run roughshod over that, and they've come back -- so
18 we haven't -- we have an unusual situation where you have a
19 statute that governs this. You have admitted conduct by the
20 defendants, because they admit all of this in their answer.
21 They admit that they copied millions of copyrighted books.
22 They admit that they did this in conjunction with Google. They
23 admit that the cost, that savings were extraordinarily high in
24 having Google do this for them.

25 And so, your Honor, we believe that this is a rather

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1 simple matter of law. The defendants' conduct goes way way
2 beyond what's permitted by the Copyright Act. So associations
3 are the perfect plaintiffs to bring this, because associations
4 like the lead plaintiff and the other international plaintiffs
5 represent members who own copyrighted works which are part of
6 the digital data base that has been copied by the defendants.
7 And under the Hunt test there are individual members of those
8 associations who have copyright claims. It certainly furthers
9 the purposes of the organization to pursue this suit.

10 And the third prong, which is the one that they're
11 really focused on about individualized proof, that's a
12 discretionary element according to the Supreme Court. The
13 Court has the prudential power to decide whether it feels that
14 that trumps the other issues why associational plaintiff may be
15 worthwhile.

16 So in this case, we have associations on behalf of
17 their members. Some of those associations, by the way, own
18 copyrighted works, they actually own books that have been
19 violated by the defendants. And some of those associations are
20 foreign associations where foreign law gives them standing to
21 bring copyright suits on behalf of their members.

22 THE COURT: So you don't think standing is a problem.

23 MR. ROSENTHAL: No, I don't think standing is a
24 problem. It doesn't do anything to narrow the case. We still
25 have 12 individual plaintiffs. We have one of the

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1 organizations in the U.S. owns works and the other
2 organizations either have the rights or own works or are doing
3 it for the benefit of their members.

4 THE COURT: And that's -- well, okay. I think I got
5 your argument.

6 Let's hear the other part of the concerns, that I
7 gather you're going to tell us about, right?

8 MS. ROACH: Yes, your Honor.

9 Your Honor, as my colleague mentioned, my name is
10 Allison Roach, and I also thank you for admitting me pro hac
11 vice in this case.

12 THE COURT: You're very welcome, as long as you paid
13 your \$300.

14 MS. ROACH: Yes, your Honor. I will be addressing the
15 libraries' motion to dismiss on standing and ripeness grounds.

16 Plaintiffs claims that making copyright, copyrighted
17 works available through the Orphan Works Project will be an
18 infringement.

19 The core of the motion is this: Not a single work has
20 been made available through the Orphan Works Project, and
21 plaintiffs do not identify a single work that will be made
22 available, let alone one in which a plaintiff holds the
23 copyright and could assert standing.

24 Moreover, we do not know what works will be made
25 available, if any, ever, and, therefore, there is not a

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1 concrete ripe infringement dispute before your Honor.

2 THE COURT: You did go ahead and do all this copying
3 before this lawsuit was begun, right? I mean, it was -- it's a
4 little like, as your adversary said, putting the cart before
5 the horse.

6 MS. ROACH: Your Honor, there was -- the digitization
7 of the works that are in the Hathitrust digital library,
8 including those that are being researched to identify Orphan
9 Works, was done before this case begun, yes.

10 The plaintiffs' claims regarding the Orphan Works
11 Project are that making available of those works electronically
12 will be an infringement. It focuses on the distribution
13 display or making available of those works.

14 The digitization of those works is encompassed in
15 their claims regarding the digitization of all the works in the
16 Hathitrust digital library. So the Orphan Works claims that we
17 have moved to dismiss here are separate, in that they focus on
18 activity that has not happened yet, and the making available of
19 those works electronically to authenticated University of
20 Michigan library patrons. But the works that will be made
21 available through the project, through that program have not
22 been identified yet. And so it is pure conjecture for the
23 plaintiffs to assert that they hold the copyrights in those
24 works and could sue for infringement of them. And we do not
25 have any facts about those works for this Court to consider in

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1 determining whether the use that is intended to be made would
2 be a lawful use under Sections 107 and 108, or whether it would
3 be an infringement as the plaintiffs assert.

4 THE COURT: Well, I don't want to get into the fair
5 use doctrine in any depth, because it'll take too long. But --

6 MS. ROACH: I understand.

7 THE COURT: -- what bothers me a little, I guess, and
8 I gather it doesn't bother you at all, is that you did all of
9 what you've now told us, and admitted in your papers, before
10 there was any opportunity for the plaintiff to complain. And
11 now you're saying, well, we can't put the genie back in the
12 bottle. And that, essentially, gives me some pause. It may
13 not sound like a lot of case law, but it does provide me with
14 some concerns. But I don't think there's much we can do about
15 it. I mean, like I said, there's no sense in dwelling on it
16 because there's nothing we can do about it that. But it colors
17 my thinking is all I suggesting.

18 MS. ROACH: Right. And, your Honor, I understand.
19 With respect to the Orphan Works Project, the only activity
20 that has happened to date has been the researching of works to
21 identify potential orphan works to make available through the
22 project.

23 There was a research process that was begun and some
24 initial candidates were identified through that process, and a
25 list of the titles of those candidates was posted on a website

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1 last July in an effort to find more information about those
2 works. And the intent was not to make that list of candidates
3 available through the project, but only to make available
4 through the project those works that the University was not
5 able to obtain more information about the rights holder during
6 that 90 days. But before the 90 days ran on any of the works
7 on that list, and before any work was made available through
8 the Orphan Works Project, the University withdrew the list and
9 issued an announcement that, due to feedback it received, it
10 needed to re-examine its research procedures, and it was going
11 to continue to scrutinize those and come up with a more robust
12 process.

13 But at this stage where no works have been selected to
14 be made available through the Orphan Works Project, we do not
15 have the facts needed to determine whether the intended limited
16 use, which would be to make these works available for
17 educational use by authenticated University of Michigan library
18 patrons.

19 What the plaintiffs are asking here is that your Honor
20 judge and enjoin the Orphan Works Project in its entirety as a
21 concept without any concrete facts to analyze. They're not
22 asking for a judgment enjoining the distribution of a
23 particular work in which they hold copyright. They're asking
24 that the judgment be made on the project as a whole, when today
25 all it is involved is the researching of works to try to

1 identify orphan works.

2 THE COURT: All right - go ahead. I think I have your
3 drift, but I'll be glad to listen to some more.

4 MS. ROACH: Well, I can move onto our standing
5 argument, which is a related issue, but I can address that now
6 if your Honor --

7 THE COURT: That's all right. I just want don't want
8 everybody to tell me how they need more time. We have 15
9 minutes left.

10 MS. ROACH: Understood, understood. I'll wrap up
11 shortly if your Honor doesn't have any specific questions about
12 the issues that I'm --

13 THE COURT: I'm trying to control myself in the
14 same -- for the same reason. But anything that's new and
15 different that I don't have in your brief, I think that's what
16 oral argument is about.

17 MS. ROACH: Understood.

18 I think something important to consider is that the
19 elimination of these issues, the Orphan Works Project issues
20 from this case will greatly streamline issues that will be
21 before your Honor going forward, and we can focus the case on
22 the issues on which we have facts, the activities that have
23 occurred, and where there are sufficient information to apply
24 the law.

25 With respect to the Orphan Works Project, we don't

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1 know what works, if any, ever will be made available, and to
2 make a determination now whether the intended use of these
3 unknown works will be an infringement, would be merely
4 advisory. And because we don't know what works we made
5 available, we do not know if the plaintiffs own copyrights in
6 those works and can assert infringement claim based on that.

7 For these reasons, the libraries respectfully request
8 that these claims be dismissed.

9 THE COURT: Very well.

10 What's the other side got to say about all that?

11 MR. ROSENTHAL: Let me just try to be pretty brief
12 here.

13 So the Orphan Works as I think the Court knows, those
14 are works where you can't find the copyright rights holder. So
15 what the University of Michigan does is it comes up with a
16 mechanism where it's going to provide, going to do research,
17 apply certain criteria, and it's going to publish a list and
18 say, if nobody comes forward in 90 days to say that you're in
19 fact the owner of one of these works, we're going to make this
20 work available. And what happens after they make this list is
21 that we bring this lawsuit because, among other things, it
22 turns out that some of our -- Mr. Salamanca and one of the
23 other plaintiffs has a work that's on this list of supposed
24 Orphan Works. Other people say, hey, wait a minute, those
25 books aren't Orphan Works. So we bring the lawsuit. They

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1 suspend the Orphan Works program and they say, you know what,
2 we've got big problems with it, so we've got to fix that. And
3 now they come into court and say, well, you don't have right to
4 bring a claim based on Orphan Works, because there is no
5 current Orphan Works program, plus how can you be an orphan if
6 you've -- how can you be an orphan if you've come out of the
7 woodwork and said, you know, I'm the father.

8 So, you know, under their theory there would never be
9 a circumstance under which anybody could ever address the
10 Orphan Works program because they simply will pull back the
11 books if somebody comes forward. And our position is they
12 don't get to do this.

13 Judge Chin had this exact issue in the Google books
14 case. And in the Google books settlement he said -- and this
15 applies broadly to our entire case here -- he said, these
16 issues about the balance between rights holders and users are
17 best left to Congress, and Congress has wrestled with the
18 Orphan Works issue. It hasn't come up with a resolution, and
19 it's not up to private parties, like the University of
20 Michigan, to say we're going to come up with our own Orphan
21 Works program and we're going to -- and we're going to hold you
22 to it. It's up to Congress, not to the defendants in this
23 case. But there's clearly standing to bring these claims.

24 THE COURT: All right. We have another motion, and
25 I'll continue to try and control myself, which really is a

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1 little more difficult for me to decide, I suppose, but it talks
2 about how the defendants' programs are not shielded by the
3 First Amendment or fair use, and I'd like to hear what the
4 plaintiff has to say about that.

5 MR. ROSENTHAL: Your Honor, that goes back to my
6 points earlier. This is a situation where Congress
7 specifically enacted a statute, Section 108, to deal with when
8 libraries and archives can make copies of copyrighted works.

9 What defendants have done here is they have copied --
10 it disregarded that section and copied literally seven plus
11 million copyrighted works. And now they're claiming, well,
12 maybe this particular work meets a 108 criteria because that
13 work may be deteriorating or missing, or maybe this particular
14 work meets another section of the Copyright Act that allows
15 access to visually disabled people, or maybe this other work
16 is -- should be allowed under some other theory.

17 Our position in this case is there cannot be, under
18 the Copyright Act, any possible justification for copying seven
19 million copyrighted works, essentially, in conjunction with a
20 major commercial entity, saving themselves hundreds of millions
21 of dollars, harming the plaintiffs, and then coming back and
22 saying, well, maybe there's a justification for one work or
23 another. And, you know, I don't know if your Honor has read
24 all of the papers submitted by the intervenors and amicus and
25 so on, but there's this attack as if we're trying to stop

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1 libraries from doing their business, like there's this notion
2 that we're trying to stop libraries from inter-library loans or
3 from making books available under the provisions of the
4 Copyright Act that permit it for visually disabled people.
5 That's not our intention here. This is a case about a
6 preemptive mass digitization program, where defendants just
7 blithely copied millions of works belonging to authors. And
8 the whole Copyright Act is designed to protect authors from
9 people taking their works and copying them.

10 THE COURT: Well, there are some exceptions, right?

11 MR. ROSENTHAL: There certainly are exceptions, and we
12 don't argue that there aren't exceptions, possible exceptions
13 on a work-by-work basis, that there might be uses of some works
14 that will be covered by fair use or by some other exception to
15 the Copyright Act.

16 But they can't digitize every book in the library
17 under some sort of fair use analysis, we're allowed to do that
18 and then come back and say, well, but we, the plaintiffs, have
19 to prove how this particular work, whether it's Harry Potter or
20 some dissertation is somehow not a fair use. The burden should
21 be on them to prove fair use. That's what the Second Circuit
22 says. And they have to do -- they have to lie in the bed
23 they've made. They have to justify it on the basis of their
24 entire mass digitization program.

25 And, again, this is something that Congress may have

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1 to wrestle with. It's wrestled with it before. It came up
2 with Section 108. It amended Section 108 as part of the DMCA
3 to deal with digital copies. It dealt with security issues.
4 It dealt with balancing all of these interests. Section 108
5 came out of years of discussions between libraries and archives
6 and rights holders and educators about this balance between the
7 rights of the copyright holders and the rights of libraries and
8 archives and the needs of people to use books. And defendants,
9 once again, have just simply decided they're going to do
10 whatever they want and then come back and try to figure out
11 ways to avoid the results of their actions.

12 THE COURT: Okay, what's your adversary have to say?
13 I guess too -- we also have of an intervenor defendant,
14 Federation of the Blind. I'll be glad to hear both of you.

15 MR. PETERSEN: Sure, your Honor. I'll begin, if
16 that's okay. Joe Petersen.

17 Your Honor, I just want to address up front this whole
18 notion that the libraries went ahead and digitized their
19 collections and then asked questions later as to how to justify
20 it. It's fundamentally not true. As your Honor will see in
21 summary judgment, the entire project, your Honor, was
22 designed --

23 THE COURT: Well, while we have you on the summary
24 judgment concept, let me make sure we do have a schedule here
25 so that we're all on the same page in this case.

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1 In terms of discovery -- just keep your thought, I
2 don't mean to discombobulate your thinking. In terms of
3 discovery, you have only three or four depositions that's left,
4 as I understand it, and then your discovery will be complete.
5 Is that fair?

6 MR. PETERSEN: That's correct, your Honor.

7 THE COURT: So, and you're going to get all of that
8 done at least in the next two weeks, is that right?

9 MR. PETERSEN: That's certainly our intention.

10 THE COURT: All right. Well, I'm suggesting that it's
11 also mine.

12 MR. PETERSEN: Thank you, your Honor. It's helpful.
13 Thank you.

14 THE COURT: If you need an order, you can just provide
15 me with one.

16 MR. PETERSEN: Thank you.

17 THE COURT: And, obviously, on notice.

18 And so let's assume that that's over by the end of the
19 month, and I now have, obviously, these motions for judgment on
20 the pleadings, how -- I don't want a big hiatus. And you
21 indicated that the summary judgment motions would be earlier
22 than had otherwise been expected or at least. When is it that
23 you all can give me fully briefed summary judgment motions?

24 MR. PETERSEN: Well, your Honor's scheduling order
25 calls for the motions to be fully briefed by July 20th.

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1 THE COURT: Yes, that's very long. I mean, since we
2 already have the judgment on the pleadings motion, which I've
3 now told you I'd like to consolidate, can you move that up a
4 little bit so that we're in a position to at least have
5 everything at the beginning of July?

6 MR. PETERSEN: Your Honor, the summary judgment
7 motions really will be on the 107 right, fair use --

8 THE COURT: So, I understand that's partially why I
9 said what I said about trying to put them together. But there
10 is really no reason to delay it till the end of July, unless
11 there is something I don't know.

12 MR. PETERSEN: Well, your Honor, I think it -- in
13 terms of once we complete the depositions, we need to put
14 together declarations, there's expert testimony on the four
15 fair use factors, there is a significant amount of facts that
16 we want to put before your Honor to talk about why the
17 libraries' steps to digitize their collections for purposes of
18 preservation and for purposes of allowing search functionality
19 and providing access to people with print disabilities, are
20 entirely lawful under Section 107 and other sections of the
21 Copyright Act. There is a lot of factual -- see, Mr. Rosenthal
22 stands up and talks about this like there's some brightline
23 rule and your Honor can rule. That's really an invitation to
24 judicial error, your Honor. The Supreme Court --

25 THE COURT: I don't think he said that.

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1 MR. PETERSEN: Your Honor, he's saying -- he's in the
2 context of a Rule 12 motion saying brightline rule that
3 libraries can't do what they've done. That's not the way fair
4 use works, your Honor. It's --

5 THE COURT: I don't want to argue fair use. I mean
6 there will be -- I'll have enough of it from you.

7 All I want now is some dates that we can count on for
8 fully briefed summary motions. And your pretrial scheduling
9 order now says July 21st. Is there a way we can do it earlier?

10 MR. PETERSEN: Your Honor, given the papers that I
11 anticipate will be filed, in my mind it makes sense, and I
12 think plaintiffs' counsel agrees with this, that three weeks to
13 oppose -- we will move, I assume they will move, there will be
14 three weeks to get opposition papers in, and then a week and a
15 half or so of reply.

16 Based upon that timetable, and to meet your Honor's
17 scheduling order, that would call for us to move in mid June.
18 We were not going to complete the depositions until the first
19 week of June.

20 THE COURT: I thought the end of this month, two
21 weeks, this is the 16th of --

22 MR. PETERSEN: Your Honor, they're not making, at
23 least one witness, I'm not sure of the scheduling of others, at
24 least one witness they're not making available to me until the
25 week of May 31 to June 8th. So I do see there's some --

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1 THE COURT: Well, as I said before, I'm prepared to
2 make that happen, so far as I have any authority to do so,
3 certainly no later than the 31st of May. And if there is a
4 reason why somebody can't -- we can't get them done, then you
5 can talk to me about it. But I'm not interested in talking
6 about it now.

7 MR. ROSENTHAL: I just, your Honor, I just -- at the
8 very outset when we talked about Mr. Loukakis from Australia,
9 he's trying to arrange his schedule, and he has some health
10 issues and he said he could be here between May 31st and
11 June 8th. So that's the reason for the -- so we're just trying
12 to see if -- and I don't think that changes the schedule, by
13 the way.

14 THE COURT: And I really don't think you need all of
15 this all finished before you draft your summary judgment --

16 MR. ROSENTHAL: Right.

17 THE COURT: -- motion.

18 MR. ROSENTHAL: Right. So that's why I think, your
19 Honor, if we could just have until that the end of that week,
20 whatever week, I think June 8 is a Friday, I'm not sure about
21 that.

22 THE COURT: I don't want to delay this.

23 MR. ROSENTHAL: I don't --

24 THE COURT: It's just not worthwhile. If you need
25 until July 21st, let's leave it at July 21st for fully briefed

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1 motions. The problem is I won't be here in July. So you can
2 take till the end of July.

3 If I can't get it by the 1st of July, it's not going
4 to do you or me any good to have it in the middle of the month.
5 So work it out any way you like. I prefer to have it when I go
6 away so I have something to put under my pillow, but it's
7 really your call.

8 MR. PETERSEN: Understood, your Honor. What I would
9 suggest that we do is I speak with counsel for plaintiffs and
10 we see if we can work out a workable schedule. There are a lot
11 of moving parts and pieces.

12 THE COURT: Yeah, I gather. That's why I think you
13 should try your best, and if you fail I won't be surprised.
14 I'll be unhappy, but not surprised.

15 Okay, let's go back.

16 MR. PETERSEN: Sure, your Honor.

17 I represent Library. Library is one library,
18 succinctly put it, serve as our collective memory. They
19 empower people regardless of status or wealth to pursue any
20 thought or idea they wish. So it was for that reason that we
21 were so surprised when we received plaintiffs' moving papers
22 and we saw the argument that libraries uniquely among all users
23 of copyrighted content only have Section 108. And we were
24 particularly surprised by that, because Section 108 actually
25 answers the question that plaintiffs pose. It says directly in

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1 the statute that nothing affects the fair use rights. So it
2 seems so fundamentally wrong. And so we put in our opposition
3 papers, we pointed to the statute, we pointed to the
4 legislative history. And then we're even more surprised when
5 plaintiffs suddenly change and say, no, no, we agree that
6 libraries aren't just left with 108, but really you need
7 circumstances, they don't have the ability to claim 107 fair
8 use. And the reason we're so surprised by that, this is all in
9 the context of Rule 12 motion on the pleadings. Fair use is
10 very --

11 THE COURT: It really isn't any more.

12 MR. PETERSEN: If that's the case, your Honor, there
13 is a lot of briefing to be done on fair use. Because the
14 initial scan --

15 THE COURT: You promised me that.

16 All I want you to understand is that there is a way in
17 which we can expedite the two sets of motions, then it's more
18 likely that we'll be able to keep up with the rest of the
19 schedule I have committed 60 days. And here we're sitting with
20 an awful lot of paper already, and we haven't started to look
21 at what you have to say in the summary judgment world. So I
22 just give that you for whatever it's worth, and hopefully it'll
23 all be taken care of on time.

24 MR. PETERSEN: Thank you, your Honor.

25 Again, I will confer with plaintiffs' counsel about

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1 the schedule and, your Honor will have on summary judgment all
2 the declarations before your Honor explaining why the initial
3 digitized scans, why they're made under 107, how the
4 transformative purpose, and it doesn't harm the market. If
5 anything, actually increases the market for these works which
6 otherwise would be lost. So I think all those proofs are
7 before your Honor. And if that's the way your Honor wants to
8 deal with this component of the motion, I'll move because there
9 is another side of the motion which they want to knock out and
10 strip the libraries of their 108 defense, and I believe that's
11 entirely improper on this motion, given, A, the breadth of the
12 number of works that are in suit. Libraries digitize works all
13 the time pursuant to Section one --

14 THE COURT: Don't misunderstand me, I'm not unhappy
15 about having another oral argument after I have your fully
16 briefed motions on summary judgment.

17 MR. PETERSEN: Understood. And I just hate your Honor
18 to say that you want to hear our arguments on 107 in the
19 context of summary judgment. So for that, my mind -- the
20 argument they're making is you can decide fair use on the
21 pleadings. We say that's fundamentally incorrect. And I'm
22 hearing your Honor to agree with our position on that.

23 THE COURT: Well, don't misunderstand me. If it turns
24 out when I read these papers, in conjunction with the others,
25 that you don't have a case, I'll tell you for sure.

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1 MR. PETERSEN: Understood, your Honor. Perfectly
2 understood, your Honor. But it would be on a summary judgment
3 record, not in the context of a Rule 12.

4 THE COURT: I think so, but -- I think so. That's my
5 current thinking.

6 MR. PETERSEN: Thank you, your Honor. So on that
7 basis I will turn my argument, if I have a few more moments, to
8 the component of their motion which seeks to strip the
9 libraries of their Section 108 rights. There is a couple
10 fundamental flaws with this argument.

11 First of all, the plaintiffs' complaint is a
12 blunderbuss complaint. It basically attacks any works that was
13 digitized by the libraries at any time. Libraries all the time
14 make reproductions under Section 108, and so they can not meet
15 their burden by saying any work the libraries digitize does not
16 meet the requirements for 108 because it's just fundamentally
17 not true. So if the motion --

18 THE COURT: Do we have a limited number under 108?

19 MR. PETERSEN: There is, your Honor, there is a
20 limited number under 108. A couple of responses on that, and
21 it goes back to what I said initially.

22 The digitize scans, initial scans that were made were
23 made pursuant to Section 107. Your Honor can -- and they were
24 also made because the library -- these are mammoth
25 institutions, libraries. They were losing portions of their

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1 collections every year. They couldn't get to it. Written on
2 acid paper, they would try to see what they were losing, see if
3 they could make the 108 right. Every year they missed pieces
4 of it, and those pieces were gone forever. So what they did
5 was they digitized those collections solely for purposes of
6 preservation and allowing for search functionality. And when
7 they determine that a work is in fact damaged, deteriorating,
8 lost or stolen and it is not otherwise available on market at a
9 fair price, they can then make the 108 copies. So 107
10 compliments 108. They work hand in hand, your Honor. And
11 that's why 108 specifically says that nothing affects the right
12 of fair use. They compliment one another.

13 So your Honor can find the initial digitizations were
14 made pursuant to 107, the one fair use right, therefore lawful.
15 And to the extent the libraries said this is a work from '50s
16 or 60's, our only copy is gone, they can then turn and avail
17 themselves of the 108 rights.

18 Now, I hear -- and this is in the papers and not in
19 argument -- but plaintiffs also argue, well, they can't benefit
20 from 108 because Google was involved in the digitization.
21 Just -- these are nonprofit library organizations. And when
22 108 speaks to not commercial, indirect or direct commercial
23 advantage, it's speaking to the actor actually claiming the 108
24 right. Google in this courtroom is not before your Honor
25 claiming that it made these under 108. The libraries are. The

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1 libraries are non-profits. It's entirely appropriate for the
2 libraries to assert that. And Google's involvement has no
3 bearing on that issue. It would be -- if you accept what
4 plaintiffs are arguing would be to accept that if the library
5 needs to make a 108 copy, and their copier was broken and they
6 ran down the street to Kinkos, they forfeit their 108 rights
7 because they used Kinkos and Kinkos has a commercial purpose.
8 It doesn't make any sense, your Honor. It's not what the
9 statute reads.

10 They also talk about the fact that systematic
11 reproduction. And what they ignore is that language is in
12 there for a very particular point, and it's systematic
13 reproduction of the same work. And the reason for that
14 language was, that wasn't just happenstance that language
15 appeared. There was a very good reason. Because the concern
16 of Congress in putting that language in was that people with
17 libraries are making repeated copies of the same work allow
18 other libraries through inter-library loan to take those copies
19 and they would hurt the publishers' markets. So it's to a
20 specific work. It doesn't speak to digitization of the large
21 number of works.

22 And there is another issue too, your Honor, with the
23 three copies. And that is, that those three copies were made
24 in view of microfilm practices. They really have no real place
25 in the digital age. Copies are made on computer in terms of

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1 loading into ram, in terms of making sure you have access to it
2 and to keep up all the time. And so there's general agreement
3 that even within its own confines, that three copy limitation
4 doesn't count against certain copies that by their very essence
5 need to be made in order to actually have a digital copy.

6 THE COURT: I'd like to hear from the Federation of
7 the Blind for a moment before I leave you. Is that going to be
8 possible?

9 MR. PETERSEN: Sure, your Honor. I'll be extremely
10 brief. There also -- this is laid out in our papers, I won't
11 repeat it. But the Orphan Works Project, which my colleague
12 Ms. Roach discussed, also meets all the elements for 108(e).
13 It's they're nonprofit, there's reasonable investigation.

14 For the copies that are made pursuant to the Orphan
15 Works Project that never got off the ground, the person
16 downloading it would own that copy, and there would be proper
17 copyright notices. So it actually fits, the Orphan Works
18 project fits comfortably within 108(e). And with that, unless
19 your Honor has any further questions for me I'll pass it off to
20 counsel for NFB. Thank you, your Honor.

21 MR. GOLDSTEIN: Good afternoon, your Honor, Dan
22 Goldstein from the National Federation of the Blind. And since
23 I paid my 300 bucks also, I appreciate your allowing me the
24 time.

25 You may be wondering why the blind have chosen to jump

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1 into this fight, especially as a defendant. The answer is
2 this. The blind had been reading digital text since the late
3 1970's, either through text-to-speech software that vocalizes
4 what you see visually on the screen, or since the 1990s with
5 something called a refreshable brail display, it looks like an
6 object belong pin cushion. So as the cursor moves across the
7 computer screen, the pins go up and down, and not only a blind
8 person but a deaf blind person can access the text simply by
9 reading the brail. This is possible because, put it in its
10 simplest terms, digital text is just zeros and ones. It's not
11 inherently audible or visual or tactile. It can be rendered
12 just as we listen to CDs and we look at computer screens, zeros
13 and once can be rendered in any, for any of those three senses.

14 Today there are tens of thousands of accessible
15 library books, for the blind, tens of thousands. We're talking
16 about ten million titles. The Hathitrust is the single largest
17 endeavor in human history that would make print books
18 accessible to the blind. Its importance was such that in 2004
19 when Google and the University of Michigan first announced this
20 project, we immediately went to Google and said, would you make
21 these scans accessible. And when they said it wasn't in their
22 present plans, we went and met with the University of Michigan
23 and five of the other Google partners, that is five other
24 libraries. And by 2006 with their support, Google had said,
25 okay, we will commit to making these scans accessible.

1 Before this data base was created, no blind scholar,
2 no matter how brilliant energetic, committed curious could walk
3 into a library and examine the wealth of intellectual capital
4 that is routinely available to any sighted person, regardless
5 of their intelligence or industry. But now today, and indeed
6 since 2008, blind students and other print-disabled students at
7 the University of Michigan who had provided adequate medical
8 documentation to the disability students services office to
9 satisfy -- to show that they are indeed print disabled, are
10 given a secret password that allows them access to the digital
11 data base that is referred to as the Hathitrust data base. And
12 they can access entire works. They are, at present, the only
13 group that have access to entire works that the Hathitrust is
14 currently doing.

15 In short, that student today has equal access to the
16 information. So if he chooses to use his capabilities as a
17 student, he can learn, participate and compete on the same
18 basis as his sighted peers. We're in this case because the
19 blind are not willing to be a permanently under educated sub
20 class. And we believe that the plaintiffs, in asserting that
21 categorically, with no consideration by you of fair use, that
22 categorically the limited monopoly granted by the copyright
23 laws is not for the purpose of advancing science and knowledge
24 by providing access, but the contrary; that the purpose of the
25 copyright laws is to advance that only for those who can see

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1 and to foreclose those who can't. That is the import of the
2 argument that is offered by the plaintiffs in this case.
3 Because they say 107 does not enable the universities to meet
4 their ADA and Rehab Act requirements by providing equal access.
5 Or they posit that, without any case law or argument, that the
6 copyright laws, if they do have that import, trump the ADA and
7 the Rehab Act; whereas fair use has traditionally been
8 understood to mediate between public access and the limited
9 monopoly. They say skip that analysis altogether.

10 At the same, they also say, well, you can't get -- and
11 actually it makes the situation worse. Because their argument,
12 eliminating 107, means that a blind student who has an
13 assignment to read something, goes to the library to get access
14 to what all the other students who are reading. The library,
15 by their argument, can't even on a retail basis make an
16 accessible copy using the scanner to provide to that student.
17 It would be a step backwards.

18 Their further argument that Chafe would not allow any
19 of this activity, that is Section 121, is based on the notion
20 that the libraries are not authorized entities. That is a
21 question for evidence and proof in this case. It's not
22 something that ipsi the plaintiffs are entitled to say we
23 declare this to be so, therefore, there can be no access under
24 Chafe.

25 Unless the Court has questions, that would be my

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1 submission.

2 THE COURT: No, but that's thoughtful and helpful.

3 I would like to listen to more, but you've now taken
4 an hour of the 45 minutes that I had. And we'll be reading a
5 lot from all of you. And I will reserve decision. And I think
6 we have a time table. So we will get all of the papers fully
7 briefed by the 21st, and you will complete all of the discovery
8 by the 8th of June.

9 Thank you again for everything. I learned a lot. But
10 we'll meet again when we have your summary judgment motion, and
11 maybe we'll have resolved it already. I mean, I'm not going to
12 sit with your motions for judgment on the pleadings and do
13 nothing. I just want you to know that if I don't complete the
14 decision, it will all happen together.

15 MR. PETERSEN: Thank you, your Honor.

16 MR. ROSENTHAL: Thank you, your Honor.

17 (Adjourned)
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